Sukhinderjit Singh Muker v Arumugam Deva Rajah

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3–24–245 OF 1997
ARIFIN JAKA J
20 FEBRUARY 1998

Partnership *— Termination — Dissolution — Outgoing partner gave notice of intention to dissolve partnership — Whether notice effective to dissolve partnership — Whether partnership dissolved by operation of law — Whether there was implied agreement between partners that partnership was not to be dissolved upon a partner leaving it — Whether dissolution technical or general — Whether a receiver and manager ought to be appointed for the purposes of winding the affairs of the partnership — Partnership Act 1961 ss 28(1), 34(1)(c) & 41*

Partnership *— Termination — Dissolution — Goodwill in firm name not assigned or sold — Whether partner in a dissolved partnership in the absence of an express assignment or sale of the goodwill in his favour had a right to use the partnership name*

The plaintiff was taken in as a partner in a legal firm known as Lovelace & Hastings ('the firm') in 1977 by the defendant and one Marjoribanks ('Marjoribanks'). In 1985, Marjoribanks retired as a partner from the firm and thereafter the plaintiff and the defendant carried on business as partners under the name of the firm. Differences began to surface between the plaintiff and the defendant. The plaintiff then gave notice of his intention to dissolve the partnership as from 31 July 1997. It was obvious from the ensuing correspondence between the defendant and the plaintiff that the defendant initially accepted the fact that the partnership was dissolved. Relying on the agreement that the firm was dissolved, the plaintiff then proceeded to set up his own practice. The defendant proceeded to carry on the business of the firm of Lovelace & Hastings on his own. The plaintiff filed an originating summons, seeking for: (i) a declaration that the partnership under the name and style of Lovelace & Hastings had been dissolved as at 31 July 1997; (ii) an order appointing a receiver and manager; and (iii) an order restraining the defendant from practising under the name and style of Lovelace & Hastings. The plaintiff contended that as there was no partnership agreement entered into between the plaintiff and the defendant, it was open to either partner to dissolve the partnership upon the giving of notice to that effect pursuant to ss 28(1) and 34(1)(c) of the Partnership Act 1961 ('the Act'). The defendant contended that there was implied an agreement between Marjoribanks, the defendant and the plaintiff, when the plaintiff came to be accepted as a partner, that the partnership was not to be dissolved upon a partner leaving it. Accordingly, the defendant contended that the notice of dissolution was in law null and void. The defendant referred to the exchange of letters between Marjoribanks and the plaintiff in an attempt to show that there was an implied agreement between the partners. Further, the defendant argued that there was never any general dissolution of the firm but only a technical dissolution each time a partner left the firm. The

issues to be determined by the court were: (i) whether the partnership had been effectively dissolved as at 31 July 1997; (ii) if so, whether the partnership should be wound up; (iii) whether a receiver and manager should be appointed; and (iv) whether the defendant should be restrained from holding himself out as a partner or proprietor of a firm bearing the name of Lovelace & Hastings. A B

Held, declaring that the partnership had been dissolved as at 31 July 1997:

(1) The provisions under ss 28(1) and 34(1)(c) of the Act are subject to any agreement between the partners. The question that had to be considered was whether there was implied an agreement to the effect that the partnership was not to be dissolved between the defendant, Marjoribanks and the plaintiff at the time when the plaintiff joined the partnership and at the time when Marjoribanks left the firm. Whether such an agreement existed is a matter to be determined having regard to all the circumstances of the case. C D

The fact that Marjoribanks chose to retire from the partnership with the consent of the partners did not and could not lead to the conclusion that the remaining partners, ie the plaintiff and the defendant had agreed to exclude the right to dissolve the partnership. In the circumstances and based on the facts of the case, it could not be inferred that they intended to exclude the operation of s 34(1)(c) of the Act. The arrangement could not be construed as an implied agreement between the plaintiff and the defendant that the partnership could not be dissolved and that the remaining partner was entitled to carry on the firm after the departure of an outgoing partner in the absence of evidence that would justify such a finding. The actual situation when a partner retired in the past was they chose to retire and not because they were not competent to dissolve the partnership. In the circumstances, the defendant had failed to prove that there was an implied agreement between the plaintiff and the defendant that the partnership could not be dissolved by notice given by the plaintiff. Therefore, the partnership had been effectively dissolved with effect from 31 July 1997 (see pp 125A–B, G–H, 127C, H–I and 128C–D). E F G

(2) Under the circumstances of the case and on the facts, it was wrong for the defendant to regard the plaintiff to have retired from the partnership thus resulting in a technical dissolution of the partnership. Furthermore, the defendant was estopped from denying that the partnership had been dissolved which he had initially accepted. In any event, the circumstances of this case did not warrant the conclusion that the dissolution was a technical one. This was because the plaintiff had made it clear of his intention to dissolve the partnership. Therefore, the dissolution in this case was a general dissolution resulting in the effective dissolution of the partnership as on 31 July 1997 pursuant to the notice of dissolution given by the plaintiff (see pp 129I and 130A–C). H I

(3) In view of the finding that the firm was effectively dissolved, s 41 of the Act became operative. On the available evidence in this case, the court was convinced that the plaintiff and the defendant had reached a point of no return in their differences. The partnership had been dissolved and under the law, its affairs had to be wound up. It was in the best interest of all concerned especially of the firm's clients that the firm be wound up (see p 130F–I).

(4) In view of the finding that the partnership had been dissolved and in the light of the prevailing circumstances, in particular, the inability of the plaintiff and the defendant to agree on the steps to be taken to wind up the firm, it was apt that a receiver and manager should be appointed for the purposes of winding the affairs of the partnership (see pp 131I and 132A).

(5) The use of the firm name when a partnership is dissolved by operation of law is subject to agreement between the partners. It cannot therefore be right to say that when the partnership is dissolved, the remaining partner has the right to use the firm name. The test whether such a partner can use the name of the dissolved firm after the dissolution is whether the goodwill of the partnership which carried on business under the firm name has been assigned and not whether the name of the dissolved firm carries the name of the partner who is objecting to the use of the name. A partner in the dissolved partnership in the absence of an express assignment or sale of the goodwill in his favour has no right to use the partnership name.

In the instant case, the plaintiff had not consented to the defendant's use of the name of Lovelace & Hastings. There was no evidence to show that the goodwill of Lovelace & Hastings had been assigned or sold to the defendant to entitle him to use the name of Lovelace & Hastings after dissolution of the partnership. Furthermore, it is unjust and unconscienable to allow the defendant to continue his practice under the name of Lovelace & Hastings just because he held a bigger share in the partnership. To allow the defendant to use the name of Lovelace & Hastings in the circumstances is to ignore the established principles and against the evidence in this case. It would also mean giving undue advantage to the defendant. The proper order would be to restraint the defendant from practising under the name of the dissolved firm, ie Lovelace & Hastings after the dissolution (see pp 132I and 133B–I); *Ng Teck Sim Colin v Teh Guek Ngor Engelin & Anor* [1995] 2 SLR 380 followed and *Syers v Syers* (1876) 1 App Cas 174 distinguished.

[Bahasa Malaysia summary

Plaintif telah diterima sebagai pekongsi dalam sebuah firma undang-undang yang dikenali sebagai Lovelace & Hastings ('firma tersebut') pada tahun 1977 oleh defendan dan seorang bernama Marjoribanks ('Marjoribanks'). Pada tahun 1985, Marjoribanks telah bersara sebagai

pekongsi firma tersebut dan selepas itu plaintif dan defendan meneruskan perniagaan sebagai pekongsi di bawah nama firma tersebut. Perbezaan mula timbul di antara plaintif dan defendan. Plaintif kemudiannya memberi notis tentang hasratnya untuk membubarkan perkongisan mulai 31 Julai 1997. Adalah nyata daripada surat-menyurat yang menyusul di antara defendan dan plaintif bahawa defendan pada mulanya menerima hakikat bahawa perkongsian dibubarkan. Dengan bergantung pada persetujuan bahawa firma tersebut dibubarkan, plaintif terus mendirikan amalan guaman sendiri. Defendan terus menjalankan perniagaan firma Lovelace & Hastings secara keseorangan. Plaintif memfailkan satu saman pemula, meminta: (i) perisytiharan bahawa perkongsian di bawah nama dan gaya Lovelace & Hastings telah dibubarkan mulai dari 31 Julai 1997; (ii) satu perintah melantik seorang penerima dan pengurus; dan (iii) satu perintah menahan defendan daripada membuka guaman di bawah nama dan gaya Lovelace & Hastings. Plaintif berhujah bahawa memandangkan tiada perjanjian perkongsian telah diikat di antara plaintif dan defendan, ia terbuka kepada mana-mana pekongsi untuk membubarkan perkongsian selepas memberikan notis mengenainya menurut ss 28(1) dan 34(1)(c) Akta Perkongsian 1961 ('Akta tersebut'). Defendan menghujahkan bahawa terdapat persetujuan yang tersirat di antara Marjoribanks, defendan dan plaintif, apabila plaintif diterima sebagai seorang pekongsi, bahawa perkongsian tidak akan dibubarkan setelah seseorang pekongsi meninggalkannya. Oleh itu, defendan berhujah bahawa notis pembubaran adalah tak sah dan terbatal di sisi undang-undang. Defendan merujuk kepada pertukaran surat di antara Marjoribanks dan plaintif dalam satu percubaan untuk menunjukkan bahawa terdapat perjanjian tersirat di antara pekongsi-pekongsi. Seterusnya, defendan berhujah bahawa tidak pernah terdapat pembubaran umum firma tersebut tetapi cuma pembubaran teknikal setiap kali seorang pekongsi meninggalkan firma tersebut. Isu-isu untuk ditentukan oleh mahkamah adalah: (i) sama ada perkongsian telah dibubarkan secara berkesan mulai dari 31 Julai 1997; (ii) jika begitu, sama ada perkongsian harus digulung; (iii) sama ada seorang penerima dan pengurus patut dilantik; dan (iv) sama ada defendan patut ditahan daripada menggelar dirinya seorang pekongsi atau tuan punya sebuah firma yang memaparkan nama Lovelace & Hastings.

Diputuskan, mengisytiharkan perkongsian telah dibubarkan mulai dari 31 Julai 1997:

(1) Peruntukan-peruntukan di bawah ss 28(1) dan 34(1)(c) Akta tersebut tertakluk kepada apa-apa perjanjian di antara pekongsi-pekongsi. Persoalan yang harus dipertimbangkan ialah sama ada terdapat perjanjian tersirat bahawa perkongsian tidak akan dibubarkan di antara defendan, Marjoribanks dan plaintif sewaktu plaintif menyertai perkongsian dan sewaktu Marjoribanks meninggalkan firma tersebut. Sama ada perjanjian demikian wujud

merupakan perkara untuk ditentukan dengan mengambil kira semua keadaan kes.

Hakikat bahawa Marjoribanks memilih untuk bersara daripada perkongsian dengan izin pekongsi-pekongsi tidak dan tidak dapat membawa kepada kesimpulan bahawa pekongsi-pekongsi yang tertinggal, iaitu plaintif dan defendan telah bersetuju untuk mengecualikan hak membubarkan perkongsian. Dalam keadaan ini dan berdasarkan fakta-fakta kes, ia tidak boleh disimpulkan bahawa mereka berhasrat mengecualikan operasi s 34(1)(c) Akta tersebut. Penyusunan ini tidak boleh ditafsirkan sebagai suatu perjanjian tersirat di antara plaintif dan defendan bahawa perkongsian tidak boleh dibubarkan dan bahawa pekongsi yang tinggal berhak meneruskan firma tersebut selepas pemergian seseorang pekongsi dalam ketiadaan keterangan yang boleh menjustifikasikan pendapat sedemikian. Keadaan sebenar di mana seorang pekongsi bersara dahulunya adalah mereka memilih untuk bersara dan bukan kerana mereka tidak kompeten untuk membubarkan perkongsian. Dalam keadaan ini, defendan telah gagal membuktikan bahawa terdapat perjanjian tersirat di antara plaintif dan defendan bahawa perkongsian tidak boleh dibubarkan menerusi notis yang diberikan oleh plaintif. Maka, perkongsian telah dibubarkan secara berkesan mulai dari 31 Julai 1997 (lihat ms 125A–B, G–H, 127C, H–I dan 128C–D).

(2) Di bawah keadaan-keadaan kes dan atas fakta-fakta, adalah salah untuk defendan menganggap plaintif telah bersara daripada perkongsian justeru itu menyebabkan pembubaran teknikal perkongsian. Tambahan pula, defendan diestop daripada menafikan bahawa perkongsian telah dibubarkan yang pada mulanya diterimanya. Walau bagaimanapun, keadaan-keadaan kes ini tidak mewajarkan kesimpulan bahawa pembubaran adalah suatu yang teknikal. Ini adalah kerana plaintif telah menjelaskan hasratnya untuk membubarkan perkongsian itu. Maka, pembubaran dalam kes ini adalah pembubaran umum yang mengakibatkan pembubaran berkesan mulai dari 31 Julai 1997 menurut notis pembubaran yang diberikan oleh plaintif (lihat ms 129I dan 130A–C).

(3) Memandangkan keputusan bahawa firma tersebut dibubarkan secara berkesan, s 41 Akta tersebut beroperasi. Atas keterangan yang didapati dalam kes ini, mahkamah yakin bahawa plaintif dan defendan telah mencapai peringkat yang tidak boleh dipertemukan dalam perbezaan mereka. Perkongsian itu telah dibubarkan dan di bawah undang-undang, urusannya harus digulung. Adalah dalam kepentingan semua mereka yang berkenaan terutamanya klien firma tersebut bahawa firma tersebut digulung (lihat ms 130F–I).

(4) Memandangkan keputusan bahawa perkongsian telah dibubarkan dan memandangkan keadaan-keadaan yang menguasai, khususnya, ketidakupayaan plaintif dan defendan untuk bersetuju

atas langkah-langkah yang harus diambil bagi menggulung firma tersebut, adalah elok bahawa seorang penerima dan pengurus dilantik untuk tujuan menggulung hal ehwal perkongsian itu (lihat ms 131I dan 132A). A

(5) Penggunaan nama firma apabila sesebuah perkongsian dibubarkan oleh operasi undang-undang adalah tertakluk kepada perjanjian di antara pekongsi-pekongsi. Maka adalah tidak betul untuk mengatakan bahawa apabila perkongsian dibubarkan, pekongsi yang tinggal berhak menggunakan nama firma. Ujian sama ada pekongsi demikian boleh menggunakan nama firma yang dibubarkan selepas pembubaran ialah sama ada nama baik perkongsian yang menjalankan perniagaan di bawah nama firma telah diserahhak dan bukan sama ada nama firma yang dibubarkan membawa nama pekongsi yang membantah terhadap penggunaan nama itu. Pekongsi dalam perkongsian yang dibubarkan dalam ketiadaan penyerahhakan nyata atau jualan nama baik yang memihak kepadanya tidak berhak untuk menggunakan nama perkongsian. B C D

Dalam kes ini, plaintif telah tidak bersetuju kepada penggunaan nama Lovelace & Hastings oleh defendan. Tiada bukti untuk menunjukkan bahawa nama baik Lovelace & Hastings telah diserahhak atau dijual kepada defendan supaya memberikannya hak untuk menggunakan nama Lovelace & Hastings selepas pembubaran perkongsian. Tambahan pula, adalah tidak adil dan tidak berpatutan untuk membenarkan defendan meneruskan amalan guaman di bawah nama Lovelace & Hastings hanya kerana dia memegang bahagian yang lebih besar dalam perkongsian. Untuk membenarkan defendan menggunakan nama Lovelace & Hastings dalam keadaan ini adalah untuk mengabaikan prinsip-prinsip mantap dan bertentangan dengan keterangan dalam kes ini. Ia juga bermakna memberi kelebihan tak wajar kepada defendan. Perintah yang wajar adalah untuk menahan defendan daripada mengamal di bawah nama firma yang dibubarkan, iaitu Lovelace & Hastings selepas pembubaran (lihat ms 132I dan 133B–I); *Ng Teck Sim Colin v Teh Guek Ngor Engelin & Anor* [1995] 2 SLR 380 diikut dan *Syers v Syers* (1876) 1 App Cas 174 dibeza.] E F G

[*Editorial Note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No W–02–763–97.] H

Notes

For cases on the termination of a partnership, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 924–949. I

Cases referred to

Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors [1990] 2 MLJ 431 (refd)

Ng Teck Sim Colin v Teh Guek Ngor Engelin & Anor [1995] 2 SLR 380 (folld)

A *Sobell v Boston & Ors* [1975] 1 WLR 1587 (refd)
Syers v Syers (1876) 1 App Cas 174 (distd)

Legislation referred to

Partnership Act 1961 ss 6, 28(1), 34(1)(c), 35(1), 40, 41

B *Robert Lazar* (*Shearn Delamore & Co*) for the plaintiff.
Raja Aziz Addruse, Gopal Sreenevasan and *Robin Choi* (*Sivananthan*) for the defendant.

C **Arifin Jaka J**: This application by way of originating summons duly amended (encl 23) was filed by the plaintiff seeking principally for:

(a) A declaration that the partnership under the name and style of Lovelace & Hastings has been dissolved as at 31 July 1997.

(b) An order appointing a receiver and manager or Receivers or Managers over the assets of the partnership with powers specified under prayer 2 of the originating summons.

D

(c) An order restraining the defendant from practising under the name and style of Lovelace & Hastings and/or holding himself out as a partner of Lovelace & Hastings.

E *The facts*

The material facts are not really disputed and are as follows. Both the plaintiff and the defendant are senior members of the Bar and until the alleged dissolution of the partnership by the plaintiff to have taken place on 31 July 1997 were practising as partners in the legal firm known as F Lovelace & Hastings ('the said firm') at 6th Floor, Wisma Tek Lee, No 38, Jalan Tun Perak, 50050 Kuala Lumpur (Kuala Lumpur Office) and at No 14B, Jalan Istana, 41000 Klang Selangor (Klang Office). The plaintiff held 33.3% whilst the defendant held 66.7% share in the equity of the said firm. The defendant commenced his legal practice as a legal assistant in G the said firm on 1 December 1963 and later became a partner on 1 May 1967.

Lovelace & Hastings is one of the oldest law firms in this country which was established in the early decade of this century in 1913. In 1977, one of the partners, the late Mr Lall Singh Mukher, who was the plaintiff's father, died. On his death, the said firm was dissolved. The defendant and H one NA Marjoribanks (since deceased) continued the partnership using the name of the said firm. They took in the plaintiff as a junior partner into the new partnership. In 1985, the late Mr NA Marjoribanks retired as a partner from the said firm and thereafter the plaintiff and the defendant carried on business as partners under the name of the said firm. It appears I that the practice went on smoothy until June 1997 when differences began to surface between the plaintiff and the defendant when the former requested for increase in his share holdings in the partnership. The differences are clearly enumerated in the plaintiff's letter dated 23 June 1997 (encl 1 exh 552). Both the plaintiff and the defendant could not reach an amicable solution to their differences. This prompted the plaintiff to write a letter

dated 7 July 1997 in reply to the defendant's letter wherein the plaintiff frankly revealed his true feelings and dissatisfaction over many issues in respect of the partnership. By that letter, he gave notice of his intention to dissolve the partnership. The relevant part of the letter in relation to the notice to dissolve the partnership is as follows:

> ... In the light of your comments and mistrust I see no point in continuing with the partnership and do not wish to do so. *I hereby give notice of dissolution of the partnership as from 31 July 1997* and will from tomorrow onwards inform the clients of my intention to start practice on my own. (Emphasis added.)

The plaintiff's case is that based on the basic premise that the plaintiff and the defendant had not entered into any partnership agreement, he had by giving the notice of his intention to dissolve the partnership effectively dissolved the said partnership and that he is entitled to all the reliefs sought for in this application.

The defendant on the other hand contends that there was implied an agreement between the late Marjoribanks, the defendant and the plaintiff, when the plaintiff came to be accepted as a junior partner that the said partnership was not to be dissolved upon a partner leaving it. Accordingly, the defendant contends that the notice of dissolution was in law null and void.

From the affidavits filed by both parties and from their respective contentions, it can be gathered that the issues to be determined by this court are:

(a) Whether the said partnership has been effectively dissolved as at 31 July 1997;

(b) If so, whether the said partnership should be wound up;

(c) Whether a receiver and manager should be appointed with a view to the implementation of the winding up; and

(d) Whether the defendant should be restrained from holding himself out as a partner or proprietor of a firm bearing the name of Lovelace & Hastings.

Under the law, one of ways of dissolving a partnership is provided for by ss 28(1) and 34(1)(c) of the Partnership Act 1961 ('the Act').

Section 28(1) reads:

> Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention to do so to all the other partners.

Section 34(1)(c) provides:

> Subject to any agreement between the partners, a partnership is dissolved —
>
> ...
>
> (c) if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

A It is clear that under s 28(1) any partner may determine a partnership in which no fixed time has been agreed upon for its duration at any time by giving notice of his intention to do so to the other partners. The partner giving the notice is vested with the discretion to determine the partnership. It is equally clear that under s 34(1)(c) that once the partner exercises his discretion and give notice to the other partners of his intention to dissolve the partnership, the partnership is effectively and properly dissolved. However, this would be subject to any agreement between the partners. Under s 35(1) of the Act, it is provided that subject to any agreement between the partners, every partnership is dissolved as regards all partners by the death of any partner. In *Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors* [1990] 2 MLJ 431 (a decision of the High Court which was affirmed by the then Supreme Court) Anuar J (as his Lordship then was) said in relation to the phrase 'subject to any agreement between the partners' at p 431:

> The meaning of the section is clear. As between the partners, the partnership is dissolved by the death of a partner. However, this would be subject to any agreement to the contrary between the partners. The death of a partner in the eye of the law leads to the total dissolution of the partnership unless the partners have expressly provided to the contrary by their agreement. Hence the burden of proving the existence of such an agreement to show that the partnership is not dissolved is on the party who asserts it (*Ram Niwas Poddar v Diwan Chand Parma Nand & Ors* AIR 1933 Lah 618).

With this principle in the forefront of my mind, I shall now proceed to deal with the issues raised.

Dissolution

Mr Robert Lazar, learned counsel for the plaintiff, contended in his written submission that as there was no partnership agreement entered into between the plaintiff and the defendant, the partnership is a partnership at will and in the circumstances it is open to either partner to dissolve the partnership upon the giving of notice to that effect pursuant to ss 28(1) and 34(1)(c) of the Act.

The question that has to be considered is whether there was implied an agreement to the effect that the said partnership was not to be dissolved between the defendant, the late Marjoribanks and the plaintiff at the time when the plaintiff joined the partnership in 1977 and at the time when the late Marjoribanks left the said firm in 1985. Whether such an agreement existed is a matter to be determined having regard to all the circumstances of the case.

It is not disputed that at the time when the plaintiff joined the firm in 1977 as a partner, albeit as a junior partner, no written agreement was entered into between the defendant, the late Marjoribanks and the plaintiff in relation to the partnership. It is also common ground that when the late Marjoribanks, a senior partner of the firm at the material time left the said partnership in 1985, no written agreement was entered into between the defendant and the plaintiff with regard to the partnership. It is also agreed

by the plaintiff and the defendant that the agreement contemplated by s 34(1)(c) of the Act can be either express or implied.

Raja Aziz Addruse, learned counsel for the defendant, referred to the exchange of letters between the late Marjoribanks and the plaintiff in an attempt to show that there was an implied agreement between the partners at the time when the plaintiff was accepted into the partnership. The late Marjoribanks wrote to the plaintiff, the relevant portion of which is as follows:

> ... on the death of your father, the firm dissolved and Rajah and I agree to continue the partnership and to take you in as a junior partner.

The reply to the letter by the plaintiff is in the following terms:

> I have read your note and agree with what you say as to the dissolution of the partnership and that you and Mr Rajah are at liberty to take anyone into the partnership. I further agree that I cannot go above Mr Rajah nor hold equal shares.

According to Raja Aziz Addruse, the exchange of the letters between Marjoribanks and the plaintiff is significant in that the plaintiff knew at the time when he joined the firm as a junior partner that the dissolution of the partnership by his father's death did not affect the continuation of the practice by the remaining partners in the name of the firm and in the circumstances, there was implied an agreement between Marjoribanks, the defendant and the plaintiff that notwithstanding the dissolution of the partnership by the death of the plaintiff's father, the law practice carried on by them was to continue under the name of the firm. He further submitted that as stated in para 13 of the defendant's affidavit (encl 12) in keeping with this agreement when the late Marjoribanks subsequently left the firm, he did so through retirement rather than by dissolution of the partnership.

With respect, I do not agree with learned counsel. A close scrutiny of the exchange of letters between the late Marjoribanks and the plaintiff clearly established the fact that the partnership was dissolved upon the death of the plaintiff's father by the operation of law under s 35(1) of the Act. The position then was when the practice was continued by the surviving partners, namely the defendant and the late Marjoribanks, a new partnership came into being (*Lee Choo Yam Holdings Sdn Bhd v Khoo Yoke Wah*). On the formation of the new partnership, using the old name of Lovelace & Hastings, the plaintiff was taken in as a junior partner. The circumstances under which he was taken in as a junior partner are clearly stated in the exchange of letters between the late Marjoribanks and the plaintiff which had been referred to earlier in this judgment. It can also be gathered from the letters that the late Marjoribanks and the defendant were at liberty to take anyone they wished into the partnership. No other terms were stated.

Mr Robert Lazar, learned counsel for the plaintiff, was right when he pointed out in his written submission that there is absolutely nothing said or agreed in the correspondence about the inability of any of the partners to dissolve the partnership when the plaintiff was taken in as a junior partner.

A In para 12(a) his affidavit in encl 12, is the defendant deposed:

> One of the agreed terms of the partnership that all partners past and present recognized and applied was that the remaining partners of the firm of Lovelace & Hastings would be entitled to carry on the firm after the departure of an outgoing partner. The outgoing partner did not have the
B right to a general dissolution of the firm. His entitlement was to be paid for his interest in the firm in accordance with an agreed formula.

I find no evidence to substantiate this allegation by the defendant. The fact that the late Marjoribanks chose to retire from the partnership with the consent of the partners does not and cannot lead to the conclusion that the
C remaining partners, ie the plaintiff and the defendant had agreed to exclude the right to dissolve the partnership.

Further, in para 12(b) of his affidavit (encl 12), the defendant highlighted that since its inception, the firm has continued in practice without any break even in instances when the partners had left the firm. He maintained that there was never any general dissolution of the firm but
D only a technical dissolution each time a partner left the firm for whatever reason and there was never any winding up of its affairs.

It is true that except for the automatic dissolution of the partnership caused by the plaintiff's fathers death, the partnership had never in the past been dissolved when the partners left the firm. As early as in 1961,
E Richard Tallala, one of the partners, too left the firm by way of retirement and not by dissolution. In his affidavit (encl 21) he deposed that he could, if he wanted to, dissolve the firm. Learned counsel for the defendant contended that this statement by Richard Tallala that he could, if he wanted to dissolve the partnership, is hypothetical and runs contrary to what had been the practice in the past. I do not agree that Richard
F Tallala's statement is hypothetical. He stated as a fact that there was indeed no agreement whatsoever amongst the partners to the effect that the partnership could not be dissolved. He chose to retire with the consent of the partners and his shares were sold to the remaining partners. He was perfectly entitled to do so under the circumstances.

G It is relevant and important to note that when the late Marjoribanks retired from the partnership, his shares were sold to the plaintiff and the defendant using a formula for the purpose of valuation of the shares. The plaintiff and the defendant continued the business of the firm under the name of Lovelace & Hastings. This was the arrangement accepted by the
H plaintiff and the defendant when they were on good terms and could see eye to eye, so to speak. Nothing more was said or agreed by the plaintiff and the defendant. In the circumstances, it cannot be inferred that they intended to exclude the operation of s 34(1)(c) of the Act. I cannot accept the suggestion by any stretch of imagination that the arrangement can be construed as an implied agreement between the plaintiff and the defendant
I that the partnership cannot be dissolved and that the remaining partner is entitled to carry on the firm after the departure of an outgoing partner in the absence of evidence that would justify such a finding.

The actual situation when a partner retired in the past was they chose to retire and not because they were not competent to dissolve the

partnership. It is in evidence that when the late Marjoribanks left the firm in 1985, he did so by retiring with the consent of the plaintiff and the defendant rather than by dissolving the firm. As there was no agreement between the partners to the effect that the partnership could not be dissolved, the late Marjoribanks could have dissolved the firm but he chose not to do so. In *Lindley & Banks on Partnership* (17th Ed) para 24–79(1) it is stated:

> ... it is competent for a partner to retire with the consent of his co-partners at any time and upon any terms.

Following this principle, it was competent for the late Marjoribanks to retire with the consent of the partners, namely the plaintiff and the defendant.

It is my judgment that in the circumstances, the defendant has failed to prove that there was an implied agreement between the plaintiff and the defendant that the partnership could not be dissolved by notice given by the plaintiff. I therefore rule that the partnership has been effectively dissolved with effect as at 31 July 1997.

One other point that I have to consider is the issue of the defendant's initial response to the notice of dissolution raised by the plaintiff. Following the notice of dissolution, the defendant initially accepted the fact that the partnership was dissolved. This was obvious from the ensuing correspondence between the defendant and the plaintiff. It appears that both the plaintiff and the defendant agreed to wind up the partnership but they failed to agree on the steps to be taken to wind up. The defendant agreed that the Bar Council and their clients should be informed of the notice of dissolution but disagreed the clients should be informed of the fact that the firm has been dissolved. The plaintiff wrote to the defendant on 4 August 1997 confirming the fact that the defendant has agreed to the dissolution of the firm. The material part of the letter reads as follows:

> We both agree that the firm stands dissolved as of 1 August 1997 and notice of the dissolution must be given to the Bar Council. As we cannot agree on the steps to be taken to wind up the firm, I suggest that this be left in the hands of our advisers as you have not agreed to my suggestion of a meeting to resolve this.

Relying on the agreement that the firm was dissolved, the plaintiff then proceeded to set up his own practice under the name of Muker & Associates and informed the Bar Council accordingly. The defendant then changed his stand and in para 9 of his affidavit (encl 12) he deposed.

> ... I am entitled in law to continue to practice as sole proprietor under the firm name of Lovelace & Hastings.

The defendant proceeded to carry on the business of the firm of Lovelace & Hastings on his own and by letter dated 26 August 1997, he notified the Bar Council:

> ... that the legal practice of Lovelace & Hastings continues with me as the sole proprietor and with the same legal assistant, namely:

A (1) Khoo Chuan Swee

(2) R Suresh a/l A Rajaratnam

The practice continues both in Kuala Lumpur and Klang at the address in your record.

The defendant also notified the firm's staff at both offices by letters dated B 25 August 1997 and 27 August 1997 that the plaintiff has ceased to be a partner of the firm and that the firm continues the legal practice with the defendant as its sole proprietor.

Learned counsel for the defendant submitted that assuming that the plaintiff has the right to dissolve the partnership under s 34(1)(c) of the C Act and by his notice of dissolution intended there should be a general dissolution of the company, the plaintiff still had obligations to perform with respect to the winding up of the affairs of the partnership under s 40 of the Act. It was incumbent on him to continue to attend to the outstanding work and affairs of the firm together with the defendant, so as to ensure that the firm's clients and staff may not be left in the lurch. Instead of D performing his obligations, the plaintiff started a practice on his own under the name of Muker & Associates and took steps to inform the firm's clients of the dissolution of the partnership and instituted the action herein seeking very drastic reliefs specified therein. It was also contended by learned counsel that by his conduct, the plaintiff showed he had no E intention of carrying out his obligations and duties which he would have to perform had there been a general dissolution of the partnership. Learned counsel further submitted that by his conduct, the plaintiff did not regard the dissolution as a general dissolution. In those circumstances, it was submitted that the defendant was entitled to change his position and continue to practice under the name and style of Lovelace & Hastings and F to treat the plaintiff as an outgoing partner, subject to his paying the plaintiff whatever he is entitled as such.

Learned counsel for the plaintiff submitted that the defendant's claim that he is entitled to change his stand for the reason that the plaintiff by his conduct did not regard the dissolution as a general dissolution is not G sustainable. Learned counsel further submitted that right from the outset the plaintiff made it absolutely and abundantly clear to the defendant of his intention to start his own practice.

To my mind, the nagging question is whether the defendant was entitled to change his position after he had unreservedly agreed initially H that the firm was dissolved. The plaintiff relied on this agreement and proceeded to set up his own practice under the name of Muker & Associate while both parties were in the process of pending a solution in winding up the firm. The plaintiff could not carry on his obligations and duties as a partner of the firm as he and the defendant could not sit together to run the firm. It was just impossible for him to remain in the firm.

I I am more than convinced and satisfied that under the circumstances of the case and on the facts, it is wrong for the defendant to regard the plaintiff to have retired from the partnership thus resulting in a technical dissolution of the partnership. In arriving at that conclusion, the defendant

was not guided by his conscience but by his desire to carry on practising as a sole proprietor of the firm of Lovelace & Hastings. I am of the view that the defendant is estopped from denying that the said partnership has been dissolved which he had initially accepted.

In any event, I agree with learned counsel for the plaintiff that the circumstances of this case do not warrant the conclusion that the dissolution was a technical one. This is because the plaintiff as I had stated earlier in this judgment had made it clear of his intention to dissolve the said partnership. I therefore rule that the dissolution in this case is a general dissolution resulting in the effective dissolution of the said partnership as on 31 July 1997 pursuant to the notice of dissolution given by the plaintiff.

Winding up of the firm

In *Lindlely & Banks on Partnership* (17th Ed) at p 695 it is stated:

> ... as a matter of law, a change in the composition of a partnership results in a dissolution of the existing firm and the creation of a new firm, in such a case the new firm will usually take on the assets and liabilities of the old without any break in the continuity of the business. This is often referred to as a 'technical' dissolution and is usually, but not always, the result of agreement.
>
> In contrast, the expression of 'general' dissolution is used to denote a dissolution involving a full scale winding up, which may well be brought about at the instance of one partner, against the wishes of the others.

In the instant case, I had ruled that the dissolution is a general dissolution. In view of my finding that the said firm is effectively dissolved, s 41 of the Act becomes operative. Section 41 reads as follows:

> On the dissolution of a partnership, every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm, and for that purpose any partner or his representatives may, on the termination of the partnership apply to the court to wind up the business and affair of the firm.

On the available evidence in this case, I am convinced that the plaintiff and the defendant have reached a point of no return in their differences. The partnership has been dissolved and under the law, its affairs have to be wound up. The longer the dispute prevails the worse it becomes for all concerned. The staff of the said firm will be left in a quandary and the clients in the lurch with anxiety and uncertainties. I am of the view that it is in the best interest of all concerned especially of the said firm's clients that the said firm be wound up so that the debts and liabilities of the firm be settled and any surplus in the assets be distributed between the defendant and the plaintiff. This is the best solution that I can think of under the circumstances. I therefore order that the said partnership be wound up.

Appointment of a receiver and manager

The purpose and desirability of appointing a receiver and manager is neatly summarized by Lord Lindlely in *Lindlely & Banks on Partnership* (17th Ed) under para 23–149 at p 666 as follows:

> The object of having a receiver appointed by the court is to place the partnership under the protection of the court, and to prevent every body, except the officer of the court, from any way intermeddling with them. The object of having a manager is to have the partnership business carried on under the direction of the court; a receiver, unless he is also appointed a manager, has no power to carry on the business.

The appointment of a receiver is not a matter of course but is readily made by the court in partnership cases if the partnership has been dissolved at the time when the application is made. It will be enough to show that one of the former partners is delaying the winding up and realization of the business (see *Kerr on the Law and Practice as to Receivers and Administrators* (17th Ed) at pp 61 & 62).

Raja Aziz Addruse, counsel for the defendant, urged the court to adopt the reasoning of Goff J in the case of *Sobell v Boston & Ors* [1975] 1 WLR 1587 and to decline to appoint a receiver. Goff J said at p 1594:

> ... I must regard this as a very important factor, and it is one which in my judgment far out-weighs the considerations in favour of granting the application, particularly as there is no attack on the integrity of the defendants.

It must be noted *Sobell*'s case was decided on the important fact that there was an oral agreement between the plaintiff and the defendants, who were practising solicitors, to the effect that the defendants were to continue to practise at the same address and under the same name when the plaintiff left the partnership. The plaintiff therein was seeking, inter alia, a declaration that the partnership between him and the defendant had been dissolved and the appointment of a receiver and manager of the property and effects of the partnership. The court held that prima facie the conduct of the parties showed an agreement for the retirement of the plaintiff from the partnership and that it should continue to subsist between the defendants and since the plaintiff had no right to interfere in the continuing partners' business, the appointment of a receiver and manager was an inappropriate remedy. The reasoning of Goff J should be looked at in the context of the finding of the learned judge in that case. The facts in that case can be easily distinguished from the facts in our present case in that the plaintiff in our case relies on the fact that the termination of the partnership between the defendant and him was brought about by dissolution and not by him retiring from the firm. I am constrained by the facts and circumstances in the instant case from adopting the reasoning of Goff J as suggested by Raja Aziz Addruse. The issue of the defendant's integrity as a practicing advocate and solicitor is never raised in the instant case.

In view of my finding that the partnership has been dissolved and in the light of the prevailing circumstances in particular, the inability of the plaintiff and the defendant to agree on the steps to be taken to wind up the

firm, it is apt in my judgment that a receiver and manager should be appointed for the purposes of winding the affairs of the partnership. I therefore order that Mr Jeffrey Gomez of Messrs Gomez and Co be appointed as a receiver and manager over assets of the partnership.

The name of Lovelace & Hasting

This is the last issue that has to be determined. It is not in dispute that following the dissolution of the said partnership, the plaintiff and the defendant parted ways; the plaintiff set up his own practice under the name of Muker & Associates and the defendant continued the practice of the dissolved partnership as a sole proprietor under the name of Lovelace & Hastings. The plaintiff however objected to the use of the firm name of Lovelace & Hastings by the defendant and seek to restrain the defendant from using the name. The issue is whether the defendant should be allowed to practise as an advocate and solicitor as a sole proprietor of a firm bearing the name of Lovelace & Hastings after the dissolution.

Mr Robert Lazar of counsel for the plaintiff submitted that the name Lovelace & Hastings forms part of the goodwill and an asset of the partnership. The asset is for the common benefit of the ex-partners, ie the plaintiff and the defendant and no one partner can point to the asset as being his own.

Raja Aziz Addruse of counsel for the defendant contended that the law makes a distinction between the partnership and the firm name under which the business of the partnership is carried on under s 6 of the Act. He further contended that while an existing partnership may be dissolved, the business of the partnership could continue in the firm name. He also submitted that the dissolution of a partnership only brings an end the relationship of the partners in a partnership and the obligations, rights, benefits and liabilities of the partners in relation to the deceased partner or the partner dissolving the partnership, but does not automatically bring to an end the firm under which the partnership carried on its business. He relied on the dictum of Anuar J in the case of *Lee Choo Yam Holdings Sdn Bhd v Khoo Yoke Wah* where the learned judge said at p 432:

> In my view, upon the death of Lee Toh Seng the partnership stands dissolved. When the business is continued by the surviving partners, a new partnership comes into being.

With all humility, I do not think that the case is an authority to support the contention that a dissolution of a partnership does not automatically bring to an end the firm. It merely says that upon the death of a partner the partnership stand dissolved and a new partnership came into being.

The use of the firm name when a partnership is dissolved by operation of law is subject to agreement between the partners. It cannot therefore be right to say that when the partnership is dissolved the remaining partner has the right to use the firm name. This is clearly started in *Lindley and Banks on Partnership* (17th Ed). Lord Lindley explained at p 243:

> If ... the goodwill of the partnership business has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership whether by

death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the goodwill sold for the common benefit of all.

The law on the question of whether a partner in a dissolved partnership has the right to carry on business in the name of the firm which had been dissolved is settled. The test whether such a partner can use the name of the dissolved firm after the dissolution is whether the goodwill of the partnership which carried on business under the firm name has been assigned and not whether the name of the dissolved firm carries the name of the partner who is objecting to the use of the name.

A partner in the dissolved partnership in the absence of an express assignment or sale of the goodwill in his favour has no right to use the partnership name (see *Ng Teck Sim Colin v Teh Guek Ngor Engelin & Anor* [1995] 2 SLR 380).

In the instant case, the plaintiff has not consented to the defendant's use of the name of Lovelace & Hastings. There is no evidence to show that the goodwill of Lovelace & Hastings has been assigned or sold to the defendant to entitle him to use the name of Lovelace & Hastings after dissolution of the said partnership. Raja Aziz Addruse further submitted that even if it is held that the plaintiff had dissolved the partnership, the court should exercise its discretion in favour of the defendant continuing his practice under the name of the firm, considering that the plaintiff has a smaller share in the partnership. In support of this contention learned counsel referred to *Syers v Syers* (1876) 1 App Cas 174. In this case, the House of Lords found on the facts there was a partnership between the appellant and the respondent wherein the appellant held 7/8 and the respondent 1/8 of the shares. After taking into consideration the very small interest of the respondent in the partnership, their Lordships thought it right to authorize the owner of 7/8, ie the appellant to purchase the 1/8 share of the respondent upon dissolution of the partnership. The partnership was dealing in the business of a music hall called 'The Oxford' and tavern called 'The Boer and the Castle'. In the instant case, it is common ground that the plaintiff held a smaller share in the partnership than the defendant. The partnership business carried on by the plaintiff and the defandant is that of a legal practice and its dissolution has a far reaching effect on its clients whose interest are at stake. The very nature of the partnership demands serious consideration on the consequences of its dissolution. I am not inclined to follow the decision in *Syers v Syers* and to exercise my discretion in favour of the defendant continuing his practice under the name of Lovelace & Hastings because it is unjust and unconscionable to allow the defendant to do so just because he held a bigger share in the partnership. To allow the defendant to use the name of Lovelace and Hastings in the circumstances is to ignore the established principles and against the evidence in this case. It would also mean giving undue advantage to the defendant. The proper order would be to restrain the defendant from practising under the name of the dissolved firm, ie Lovelace and Hastings after the dissolution. I therefore order that the defendant be

restrained from practising under the name of Lovelace & Hastings immediately. He is of course at liberty to practise under any other name.

Conclusion

In the premises, I order judgment be entered for the plaintiff in term of the originating summons as follows:

(1) A declaration that the partnership practising under the name and style of Lovelace & Hastings has been dissolved as at 31 July 1997.

(2) An order appointing Mr Jeffrey Gomez of Messrs Gomez & Co as receiver and manager over assets of the partnership with the following powers:

2.1 to take possession, custody and control, to collect get in and receive all assets, properties, effects of business, monies, stock-in-trade, shares, choses in action, agreements, securities, deeds, books, diskettes, programmes, documents, records and papers of or in the name of the partnership or in which the partnership has an interest both legal and beneficial.

2.2 to take possession, control, custody of and to get in, receive, collect and make an inventory of assets and keep all assets comprising but not limited to properties, plant, machinery, equipment, motor vehicles, furniture and fittings, office equipment, stock-in-trade, book debts, securities, monies, titles and the other deeds, books, documents, financial records, effects of business and all other properties of the partnership whether movable or immovable, howsoever constituted and wheresoever situated;

2.3 to deal with and sell by public auction, public tender or private treaty, hire, lease, assign or otherwise dispose of the assets comprising but not limited to equipment, furniture and fittings, office equipment, stock-in-trade, securities and effects of business, moveable or immoveable of the partnership with power to transfer the whole or part thereof and for all such purposes to sign and perfect all instruments of dealings, all statutory documents, receipts and discharges in respect of the abovesaid assets;

2.4 to assist the plaintiff and defendant in so far as it is desirable to do so, for the purpose of ensuring the orderly winding up of the affairs of the partnership.

2.5 to incur any expense for goods or services which is necessary or incidental to the performance of the Receivers and Managers' functions herein and to make appropriate payment that respect;

2.6 to operate the partnership's bank accounts (namely the accounts held with Citibank (M) Bhd at its headquarters along Jalan Ampang — Account No 0053896014 and Account No 24530078584 and Standard Chartered Bank (M) Bhd — Account No 106162754) and to open a new bank account for

A the purpose of discharging their duties, including the transfer of all monies in the partnership's existing accounts to a new account, to deposit herein all monies received and make appropriate payments therefrom for all purposes necessary or incidental to the performance of the Receivers and Managers' functions, subject to a proper account being maintained;

B 2.7 to recover in full or make any compromise or arrangements with the debtors of the partnership in effecting the recovery of book debts of the partnership;

2.8 to determine or vary any lease or tenancy of premises in the name of the partnership;

C 2.9 to terminate the employment of any manager, agent, officer, servant or workman of the partnership;

2.10 to engage such professionally qualified persons necessary to assist the Receivers and Managers in the execution of their powers and duties herein and to make payment for the same from the assets of the partnership;

D 2.11 to institute, continue, defend or otherwise participate in, or compromise any legal proceedings, including the powers to make any compromise or arrangement with creditors and to make appropriate applications to the court to enforce or protect the partnership's rights and interest, whether in their own names or in the name of the plaintiff and defendant;

E 2.12 to rank and claim in bankruptcy, insolvency, sequestration or liquidation of any person or company indebted to the partnership, to receive dividends and to accede to trust deeds for creditors of any such person;

F 2.13 to investigate into the affairs of the partnership and to prepare a report or reports on the investigations for the purpose of lodging such reports with this honourable court or any other relevant statutory authorities and bodies; and

G 2.14 to do all things incidental to and conducive to the execution of the powers and duties herein of the Receivers and Managers.

(3) The defendant whether by himself, his agents, servants or otherwise to forthwith deliver to the Receivers and Managers:

H 3.1 possession, custody and control of all assets, properties, effects of business, monies, stock-in-trade, shares, chooses in action, agreements, securities, deeds, books, diskettes, programmes, documents, records and papers of or in the name of the partnership (solely or otherwise) or in which the partnership has any interest, legal or otherwise ('the partnership records');

I 3.2 the keys and/or access cards to the offices of the partnership and to all premises, at which any business or operation of the partnership is carried out or conducted (either regularly or otherwise) or at which any of the partnership records are stored, kept or located ('the premises') and to permit and grant

the Receivers and Managers and their agents and servants immediate access to the premises.

(4) That the said Receivers and Managers, whether by themselves, their agents servants or otherwise be at liberty and are permitted to do all such acts and things necessary for the purposes described in paras (1), (2) and (3) above including the commencement of legal proceedings and without prejudice to the generality of the foregoing the right to enter upon the premises referred to in para (3) above and that they are dispensed from having to provide any security for the same.

(5) That the Receivers and Managers appointed be required to file into court, a statement of affairs showing the assets and liabilities of the partnership every two months beginning from the date of their appointment.

(6) That the said Receivers and Managers are to be indemnified from the assets of the partnership for all fees, charges, costs and expenses, including their remuneration, payable or arising or incurred or due as a result of acting as Receivers and Managers. The basis of the Receivers and Managers fees shall be in accordance with the scale of rates prescribed by the firm and upon the Receivers and Managers lodging a copy of their bill or invoice with this honourable court, the Receivers and Managers are authorized to make payment to themselves of the amount billed within seven days of the said lodgment.

(7) That the Receivers and Managers be at liberty to apply to this court for further directions.

(8) An order restraining the defendant from practising under the name and style of 'Lovelace & Hastings' and/or holding himself out as a partner of the said 'Lovelace & Hastings'.

(9) That the parties to bear their own costs.

(10) That the parties be at liberty to apply.

In conclusion, I wish to add as an observation that it is sad that a well established firm of Lovelace & Hastings has to come to an end by an order of this court.

To the defendant, the orders I make are harsh. To me, it is unavoidable as this was brought about by the parties own conduct. It would be ideal in a situation like this if the partners should exercise some restraint and adopt the attitude of give and take and try to solve differences amicably before resorting to court action. The dispute between the plaintiff and the defendant in this case would not have arisen if they set out the terms of the partnership when they first embarked into practice in the partnership. It is hoped that in future advocates and solicitors should be mindful of this before embarking into a partnership.

Order accordingly.

Reported by Jafisah Jaafar